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No. 06-72

Supreme Court, U.S.
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In The
Supreme Court of the United States

HERMAN APPEL,

Petitioner,

v.

ALBERTO R. GONZALES, ATTORNEY GENERAL OF THE UNITED STATES,

Respondent.

On Petition For Writ Of Certiorari To The United States Court Of Appeals For The Ninth Circuit

REPLY BRIEF FOR THE PETITIONER

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REPLY BRIEF FOR THE PETITIONER

This Court should grant Petitioner's petition for writ of certiorari to resolve the growing and irreconcilable conflict among the circuits on the important issue of whether aliens who turned down plea offers, proceeded to trial, and were convicted at a time when they were statutorily eligible for relief from removal under former 8 U.S.C. § 1182(c), Immigration and Nationality Act ("INA") § 212(c) (known as "§ 212(c) relief") remain eligible to apply for that relief despite the law's subsequent repeal. Respondent has entirely failed to rebut Petitioner's arguments that he remains eligible for § 212(c) relief, and that no showing of reliance or a *quid pro quo* agreement is required in order to show impermissible retroactive effect under this Court's well-established retroactivity analysis.

1. Respondent's assertion that the issues raised in Petitioner's petition for writ of certiorari do not warrant this Court's review is without merit.[1] As detailed in the petition, there is an irreconcilable split among the circuits on an issue that has a far-reaching effect – application of

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[1] As a threshold matter, Respondent unjustifiably attempts to limit the scope of the question presented to only those aliens whose convictions by jury trial constituted *aggravated felonies*, rather than to all aliens whose convictions by jury trial rendered them removable prior to the enactment of the Antiterrorism and Effective Death Penalty Act of 1996 ("AEDPA"), Pub. L. No. 104-132, 110 Stat. 1214 (Apr. 24, 1996), and the Illegal Immigration Reform and Immigrant Responsibility Act of 1996 ("IIRIRA"), Pub. L. No. 104-208, 110 Stat. 3009 (Sept. 30, 1996). There is no cogent reason to so restrict the question presented, particularly in light of the fact that this Court's decision in *INS v. St. Cyr*, 533 U.S. 289 (2001) extends to *all* convictions attained by plea agreement for which aliens required (and were otherwise eligible for) § 212(c) relief. This Court should therefore consider the question presented as that originally stated in the petition.

this Court's holding in *St. Cyr* to aliens who turned down plea agreements and were convicted by jury trial prior to the enactment of AEDPA and IIRIRA. This split has become even more pronounced since this petition was filed. Since then, as Respondent acknowledges, the Tenth Circuit decided *Hem v. Maurer*, 458 F.3d 1185 (10th Cir. 2006) which, like the Third Circuit in *Ponnapula v. Ashcroft*, 373 F.3d 480 (3d Cir. 2004), extended *St. Cyr*'s holding to aliens who were convicted by jury trial in a case, like here, where the alien did not appeal the conviction. The Fifth Circuit ruled to the contrary earlier this year in *Hernandez-Castillo v. Moore*, 436 F.3d 516, 519-20 (5th Cir. 2006), *cert. denied*, ___ S.Ct. ___, 2006 WL 849672 (U.S. Oct. 2, 2006) (limiting *St. Cyr*'s holding to aliens convicted pursuant to plea agreements), further widening the split among the circuits on this issue.

a. Although Respondent attempts to use *Hernandez-Castillo* to support his position, and to distinguish the Tenth Circuit's holding in *Hem*, both decisions only support Petitioner's argument that the circuit split continues to become even more pronounced, and requires the Court's intervention to establish nationwide uniformity on this issue. In *Hernandez-Castillo*, the Fifth Circuit held that it was *not* impermissibly retroactive to apply the repeal of § 212(c) to aliens who were convicted by jury trial. 436 F.3d at 520. By contrast, in *Hem*, the Tenth Circuit held it *was* impermissibly retroactive to apply the repeal of § 212(c) relief to aliens who were convicted by jury trial and who gave up their right to appeal their conviction when such an appeal *could have* rendered them ineligible for § 212(c) relief. 458 F.3d at 1199. As the court in *Hem* held, it is impermissible to apply the repeal of § 212(c) to "a defendant, like Hem, [who] *proceeds to trial*, is

convicted, chooses not to pursue an appeal when that appeal could result in the loss of § 212(c) relief and, subsequently, loses the availability of § 212(c) relief following the Attorney General's decision to apply IIRIRA § 304(b) retroactively. . . ." *Id.* at 1200 (emphasis added).

In his opposition, Respondent attempts to argue that *Hem* "does not assist Petitioner" because the facts presented in that case were not exactly the same as those in the instant case. Brief for the Respondent in Opposition ("Res. Opp.") at 11 n.2. However, in reaching its holding, the *Hem* court itself remarked on the irreconcilable split among the circuits on the issue of what type of reliance on prior law, if any, is required in applying both the *Landgraf* retroactivity analysis,[2] and this Court's holding in *St. Cyr,* to aliens who were convicted by jury trial.[3] 458 F.3d at 1191. As the court in *Hem* noted, the Fourth Circuit has held that no reliance on the prior law is necessary in order to find that a new statute has an impermissible retroactive effect, *id.* at 1191, *citing Olatunji v. Ashcroft*, 387 F.3d 383, 396 (4th Cir. 2004).[4] It held, in the alternative, consistent with the Third and Sixth Circuits, that if any level of reliance is required, it need only be objectively reasonable, rather than actual, reliance. *Id.*, *citing Ponnapula*, 373 F.3d 480 and *Thaqi v. Jenifer*, 377 F.3d 500, 504 n.2 (6th Cir. 2004). By contrast, as the court in *Hem* noted, the

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[2] This refers to the two-step retroactivity test established by this Court in *Landgraf v. USI Film Products*, 511 U.S. 244, 280 (1994), as discussed in Petition for Writ of Certiorari ("Cert. Pet.") at 9-10.

[3] The court in *Hem* also specifically noted that "St. Cyr left unanswered [this] key question." 458 F.3d at 1186.

[4] As the court in *Hem* noted, the Fourth Circuit prior to *Olatunji* had required subjective reliance on prior law in the context of § 212(c) relief. *Hem*, 458 F.3d at 1192 n.4, *citing Chambers v. Reno*, 307 F.3d 284 (4th Cir. 2002).

First, Second, and Eleventh Circuits have imposed an individual, subjective, reliance requirement onto the retroactivity analysis, *id.*, *citing, inter alia, Dias v. INS*, 311 F.3d 456, 458 (1st Cir. 2002), *cert. denied*, 539 U.S. 926 (2003), *Rankine v. Reno*, 319 F.3d 93, 100 (2d Cir. 2003), *cert. denied*, 540 U.S. 910 (2003), and *Brooks v. Ashcroft*, 283 F.3d 1268, 1274 (11th Cir. 2002), while the Seventh Circuit has gone even further requiring a showing of a *quid pro quo* agreement in order to establish that a new law has an impermissible retroactive effect, *id.*, *citing Montenegro v. Ashcroft*, 355 F.3d 1035, 1037 (7th Cir. 2004) (per curiam). The Fifth and Ninth Circuits have also held that subjective reliance is required in order to find impermissible retroactive effect, *see Hernandez-Castillo v. Moore*, 436 F.3d 516, 519-20 (5th Cir. 2006); *Armendariz-Montoya v. Sonchik*, 291 F.3d 1116, 1121-22 (9th Cir. 2002), *cert. denied*, 539 U.S. 902 (2003), while in its recent decision, the Tenth Circuit joined the team of circuits that requires only objectively reasonable reliance, *see Hem*, 458 F.3d at 1197.

Thus, of the ten circuits to weigh in on this issue to date, the current tally is: one for a *quid pro quo* requirement, five for actual subjective reliance, three for objectively reasonable reliance, and one for no showing of reliance required at all. This split has caused some circuits to hold that § 212(c) relief remains available to aliens who were convicted by jury trial prior to the law's repeal, while others have reached the opposite result. *See* Cert. Pet. at 12-13; *see also Hem*, 458 F.3d at 1200. Thus, contrary to Respondent's argument, it is clear that the circuits are deadlocked on this issue, and that uniformity in application of the *Landgraf* analysis to this class of aliens can only be reached through this Court's intervention.

b. Moreover, Respondent has clearly misinterpreted this Court's decision in *Fernandez-Vargas v. Gonzales*, 126 S.Ct. 2422 (2006) in arguing that the case supports imposing a *quid pro quo* requirement onto the § 212(c) retroactivity analysis. Res. Opp. at 10. In *Fernandez-Vargas*, this Court held that it was not impermissibly retroactive to apply a reinstatement of removal provision in IIRIRA (section 241(a)(5)) to aliens who had previously been removed from the United States, and who unlawfully reentered prior to IIRIRA's effective date. 126 S.Ct. at 2423. The Court's reasoning was based on the fact that the new law did not penalize the actual act of reentry, but rather created a removal process to be initiated *at any time* after reentry. *Id.* at 2432. As the Court held, it is "the alien's choice to continue his illegal presence, after illegal reentry and after the effective date of the new law, that subjects him to the new and less generous legal regime, not a past act that he is helpless to undo. . . ." *Id.* at 2432.

Contrary to Respondent's assertion (at 10), the Court in *Fernandez-Vargas* did not "emphasize the importance" of the *quid pro quo* agreement in *St. Cyr*, but rather used that as an example of a single past act to which new legal consequences subsequently attached, as opposed to the petitioner's ongoing choice to remain in the country, both before and after the passage of the new law. *Id.* at 2433 ("[T]he branch of retroactivity law that concerns us here is meant to avoid new burdens imposed on completed acts"). Here, as Petitioner's single past act of rejecting a plea agreement and proceeding to jury trial fits squarely within this Court's reasoning, *Fernandez-Vargas* clearly supports finding that it would be impermissibly retroactive to deny Petitioner eligibility to apply for § 212(c) relief. *See also Hem*, 458 F.3d at 1198-99 (finding *Fernandez-Vargas*

supports its application of "objectively reasonable reliance" standard).

c. Respondent's argument that this issue is "unlikely to recur with any substantial frequency" is entirely without merit. Res. Opp. at 9. As discussed above, just this year, the Fifth and the Tenth Circuits have considered this issue and have reached opposite conclusions. Furthermore, as discussed in the petition at 3-4, approximately 55,000 convictions are sustained through jury trial each year, indicating that the continuing availability of § 212(c) relief for aliens who turned down plea offers and were convicted by jury trial prior to the law's repeal has far-reaching effects on the immigrant population in the United States and on this nation's immigration laws. As Petitioner fits squarely within this class of aliens, his case presents an appropriate vehicle for this Court to resolve the irreconcilable conflict among the circuits on this issue.

2. Respondent also attempts to argue the merits of the case in its opposition, even though that would be better reserved for when and if certiorari is granted. Nonetheless, Respondent's arguments must be addressed as they grossly misconstrue this Court's retroactivity analysis by attempting to impose an actual reliance requirement, even though *Landgraf* and its progeny, make clear that reliance is not required in order to establish that a new law has an impermissible retroactive effect on prior conduct.

a. Respondent first erroneously argues that aliens who were convicted by jury trial prior to the repeal of § 212(c) are ineligible to apply for that relief because they cannot demonstrate an actual, subjective reliance on the state of the law at the time of conviction. Res. Opp. at 6-7.

Respondent fails to address Petitioner's argument that aliens (like himself) who *turn down plea agreements* and proceed to trial demonstrate the same reasonable reliance as the aliens in *St. Cyr* who opted to *accept* those plea agreements. *See* Cert. Pet. at 15-19. As the Tenth Circuit noted:

> *St. Cyr* addressed the question of retroactivity *as applied only to those in situations similar to St. Cyr himself* – aliens who have pled guilty to crimes who were later made deportable by IIRIRA. . . . The Court generalized to a category of affected aliens from the facts of the case before it. . . .

Hem, 458 F.3d at 1199 (emphasis added). *Hem* thus made clear that there must be an individualized analysis of whether the repeal of § 212(c) would have an impermissible retroactive effect with respect to the relevant class of aliens.

The *Hem* court first considered the "attenuated role reliance played in *Landgraf* [which] can . . . not be plausibly read to erect a reliance prerequisite to sustaining a retroactivity claim." *Id.* at 1193. The court then noted that reliance did not even factor into this Court's retroactivity analysis in *Hughes Aircraft Company v. U.S. ex rel. Schumer*, 520 U.S. 939 (1997), and that only a reasonable reliance standard was applied to its retroactivity analysis in *Martin v. Hadix*, 527 U.S. 343 (1999). *Hem.* at 1194-95. The court further found that "*St. Cyr* leaves little doubt that the Supreme Court has never insisted upon actual reliance as a prerequisite to sustaining a retroactivity

claim." *Id.* at 1195.[5] The court thus rejected exactly the type of subjective reliance requirement that Respondent asks this Court to impose, remarking that "a requirement that a petitioner demonstrate that he *actually* relied on § 212(c) turns the historic presumption against retroactive application of statutes on its head." *Id.* at 1192 (emphasis in original).

Respondent further fails to recognize *Hem*'s insight that different classes of aliens may present different reasonable reliance interests that render application of § 212(c)'s repeal impermissible retroactive. In *Hem*, that class of aliens was those who were convicted by jury trial and decided to forego their right to appeal those convictions at a time when they were eligible for § 212(c) relief. *Id.* at 1199. In *Ponnapula*, that class of aliens was those, like Petitioner, who turned down plea agreements (which might have allowed them to avoid the later predicament of removability with no waiver) and were convicted by jury trial at a time when they were eligible for § 212(c) relief. 373 F.3d at 494-95. *See also* Cert. Pet. at 17-19. The Tenth Circuit in *Hem* has only reaffirmed that there are numerous points along the spectrum of criminal proceedings at which aliens may establish a reasonable reliance interest, such that it would be impermissibly retroactive to deprive those aliens (like Petitioner) of eligibility for § 212(c) relief.

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[5] As Petitioner argues more fully in his petition, the facts of *Landgraf* make clear that it is not necessary to demonstrate detrimental reliance in order to show impermissible retroactive effect, as it is implausible to suppose that at the time the relevant illegal acts of sexual harassment occurred, the perpetrator relied on the then-exiting provisions of the law providing for legal remedies.

b. Respondent also erroneously argues that the Second Circuit's decision in *Restrepo v. McElroy*, 369 F.3d 627 (2d Cir. 2004) does not support Petitioner's claims. Res. Opp. at 12-13. However, as with *Ponnapula* and *Hem*, *Restrepo* sets up yet another point during criminal proceedings at which reliance on the law at the time *could reasonably* develop – at the point of forgoing filing an affirmative application for § 212(c) relief prior to the change in law. The court in *Restrepo* agreed that reliance may be established by the act of not affirmatively applying for § 212(c) relief, but did not definitively decide whether that reliance must be actual or reasonable – which is precisely why review by this Court is warranted.[6]

c. Finally, in attempting to rebut Petitioner's Equal Protection argument, Respondent conflates the *Landgraf* retroactivity analysis with the rational basis that the Constitution requires in order for the government to treat similarly situated persons differently. Res. Opp. at 13. As discussed at length in the petition, there is absolutely no rational basis for allowing aliens who accepted plea offers to retain eligibility to apply for § 212(c) relief, while denying that same eligibility to aliens who turned down those plea offers and proceeded to trial. Cert. Pet. at 22-26.

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[6] Inexplicably, Respondent suggests that Petitioner is barred from citing to *Restrepo* in his Petition for Writ of Certiorari because he cited it only in his Reply, but not in his Opening, brief. Respondent ignores the fact that *Restrepo* was not issued until April 1, 2004, after Petitioner's Opening brief was already filed.

CONCLUSION

For all the foregoing reasons, and for those presented in the petition, the petition for writ of certiorari should be granted.

Respectfully submitted,

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